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IN THE

# Supreme Court of the United States

OCTOBER SESSION, 1967

No. 1125

RONALD BORCHELT, CALVIN POPEJOY and DANIEL ANGELINI, Petitioners,

vs.

UNITED STATES OF AMERICA

# Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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# Supreme Court of the United States

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No._____

RONALD BORCHELT, CALVIN POPEJOY and DANIEL ANGELINI, Petitioners,

vs.

UNITED STATES OF AMERICA

# Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

Ronald Borchelt, Calvin Popejoy and Daniel Angelini, your petitioners, respectfully pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above entitled cause on December 19, 1967.

## OPINION BELOW

The causes were argued before a division of the United States Court of Appeals for the Eighth Circuit. The division rendered its judgment affirming petitioners' convictions.

## JURISDICTION

The judgment of the United States Court of Appeals was entered on December 19, 1967. Mr. Justice White extended the time for filing a petition for Writ of Certiorari to and including February 17, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and Rule 37(c) of the Federal Rules of Criminal Procedure.

## QUESTIONS PRESENTED

I.

Whether the admission of unsworn out-of-Court declarations by third persons not named as defendants violates the hearsay rule and denies petitioners the constitutional right of confrontation.

II.

Whether the lack of positive evidence of essential elements of the offenses charged against petitioners, their intent and the commission of acts, except such as may possibly be created by inferences based upon inferences, vitiates petitioners' convictions.

## CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provision involved, set forth in appendix B, is as follows:

The Constitution of the United States, Sixth Amendment.

## STATEMENT

Petitioners were convicted for violation of Title 18, Section 1341, the Mail Fraud Statute. The indictment named eight different defendants in twenty-nine counts, one was acquitted by the Court and the other by the jury. This petition is limited to only three of the defendants. The indictment charged a scheme to defraud through the sale of paint and corresponding franchises to sell the paint. There is no charge of conspiracy to violate any of the Mail Fraud Statutes. Petitioner Borchelt was found not guilty on counts three, four and ten, counts fourteen and sixteen were dismissed by the Court and was sentenced on the remaining counts, a total of eight years, the first four years under the Penal Section of the Statute, and four consecutive years under Title 18, Section 4208 (A) (2), and further fined a total of twenty-five hundred dollars ($2,500.00) on a combination of various counts.

Popejoy was convicted of counts six, twelve, fifteen, seventeen, twenty, twenty-two, twenty-three, twenty-five and twenty-nine. He was sentenced to a total of thirty months and a fine of one thousand dollars ($1,000.00).

Angelini was convicted of counts one, five, seven, nine, twelve, fifteen, eighteen, twenty, twenty-three, twenty-five, twenty-seven, and twenty-nine, and sentenced to a total of six years, three years under the Penal Statute, and three years consecutive under Title 18, Section 4208 (A) (2).

Borchelt was engaged in the manufacture and sale of a plastic coating type paint called Pylon. Borchelt was originally a franchised distributor for the product and eventually became the sales manager for Chem Plastics and Paint Corporation, and later the general manager

for the National Chem Plastics Corporation. The Chem Plastics Corporation was incorporated in Missouri on August 8th, 1962, and a sales office was opened in the City of St. Louis. A large number of salesmen worked for the firm. The firm was organized by Harold E. Pritchard, convicted and sentenced to ten years.

The firm advertised on a National basis offering exclusive and non-exclusive franchises for various geographic areas in the United States and Canada. The franchises were classified dealer, jobber, and distributor, each was plainly labeled and printed on a different colored paper. All paint and franchises were sold by way of written contracts setting out the duties and obligations of each party. All of the contracts required a monthly quota on the part of the dealer, jobber or distributor. Each contract was assignable by the company. The company dealt on a cash basis, and did not ship any product until paid by bank draft or other means of suitable exchange.

On March 17, 1965, National Chem Plastics was incorporated in the State of Nevada. A separate sales office was opened in Las Vegas, Nevada, staffed by many salesmen. Only one of the Petitioners, Angelini, did sales work out of the Las Vegas office.

Some short time after March of 1965, The Chem Plastics Corporation in St. Louis, Missouri ceased doing business, and National Chem Plastics began doing business in St. Louis. National Chem Plastics used a newly acquired building in Page Industrial Center in St. Louis County, Missouri.

Petitioner Borchelt was the general manager of the office of National Chem Plastics in St. Louis, and handled

sales and manufacturing. Popejoy lived in Las Vegas, Nevada, and was president of the National Chem Plastics sales office in Las Vegas for a short time.

The company obtained endorsements from the Chamber of Commerce and the Bank of Commerce in Las Vegas, Nevada. Each of these endorsements were true, however, the Chamber of Commerce and the Bank asked the companies to cease publishing copies of the endorsements.

The companies used their Dunn & Bradstreet report to show the prospective buyers. The report contained financial data on sales, profits, and other relative matters. There was evidence by the Government that the figures were incorrect.

National Chem Plastics occupied a fairly large industrial building in St. Louis County under a long term lease; the building housed manufacturing facilities and office personnel. Most of the prospective customers, except those in Las Vegas, came to the office in St. Louis, and would go to the factory, or prior to the factory, the sales office of Chem Plastics Corporation of the City of St. Louis.

The customers were told, by way of advertising, that their money would be secured by inventory. All of the customers received their inventory and product, with one exception.

The sales advertisement stated that a factory representative would assist in setting up the customer in his or her respective area. The main complaint of the various customers was that after they entered into the contract with the company, paid their money, and received their product, they would not receive any assistance from the

company in helping set up a sales force or sales office. A few of the customers complained of defective product, however, most of them were satisfied with the product.

The company engaged in direct mail advertising to sell the product. Dealers, Jobbers, or distributors could avail themselves of this mail order advertising by paying the bulk postage. The checks were made payable to the Postmaster. The returns or the inquiries to this direct mail were sent by the company to the respective dealer, jobber, or distributor. Some of the customers complained that they did not receive any replies, or that they received very few replies in contrast to the thousands of cards that they had sent out.

Some dealers, jobbers, and distributors complained that they were sold product and area franchises that infringed or overlapped on other contracts made by the company. The majority of these contracts were in California and Colorado.

The government introduced evidence to show that Chem Plastics and Paint Corporation was incorporated in the State of Missouri, and that National Chem Plastics was incorporated in the State of Nevada, Government's Exhibits No. 2 and 3. The Chem Plastics Company operated in the City of St. Louis. On or about July 1st, 1965, National Chem Plastics began to do business and Chem Plastics ceased doing business.

Henry Bealler was, at various times, President of Chem Plastics and Paint Corporation (Tr. 16). He was production manager of National Chem Plastics from September 4, 1965 until the Corporation went out of business (Tr. 16). Bealler testified that the Chem Plastics Corporation had a sales office in St. Louis, Missouri together with a ware-

house (Tr. 17). Harold Pritchard was the owner of the Chem Plastics and Paint Corporation (Tr. 17). Pritchard gave orders to Bealler concerning bills to pay and other matters (Tr. 18).

Ronald Borchelt was the distributor in Ohio, and not with the firm when Bealler was there (Tr. 18). Angelini, was not with the firm at this time (Tr. 19). Bealler went to work at National Chem Plastics Corporation, Ronald Borchelt was his boss. This was September of 1965 (Tr. 20). Angelini was a salesman (Tr. 21, 22). Pritchard gave the orders concerning the operations of National Chem Plastics, however, he was out of town most of the time (Tr. 21).

The two corporations sold a total of around five hundred contracts (Tr. 24).

Charles P. Guess, a bookkeeper, who formerly worked for National Chem Plastics, and Chem Plastics and Paint Corporation, testified that he prepared the general ledger and the profit and loss statements and the balance sheets (Tr. 38), for the companies. Guess received his orders from Pritchard (Tr. 39). Guess prepared the financial reports for both companies (Tr. 39), and financial statement for National Chem Plastics dated June 30, 1965 (Tr. 42). Guess testified that the figures in the books and records were different than those he submitted in his reports (Tr. 47). Pritchard told him to change the figures that appeared in the report (Tr. 46).

Petitioner Calvin Popejoy was President of National Chem Plastics (Tr. 90). He was president of the company for a short period of time.

Robert Wagman, an investigator for Dunn and Bradstreet, testified that he was on the premises of National

Chem Plastics (Tr. 100). He discussed financial statements with Charles Guess (Tr. 102).

Warren Jost testified that he worked for Dunn & Bradstreet in Las Vegas, Nevada, and had an occasion to go to the office of National Chem Plastics in Las Vegas (Tr. 111). He met Calvin Popejoy at the office (Tr. 111). Pritchard gave a financial statement to Jost, he told Jost his name was Houser (Tr. 113).

Porter Henry was a reporting supervisor for Dunn & Bradstreet (Tr. 123). Henry testified that the Dunn & Bradstreet report in his office had contained "Under investigation, further report will follow", the Government called a number of other witnesses, the majority of these witnesses were persons who purchased product and related franchises governing the areas, terms and conditions of the sale. Melvin Flamm, Treasurer of Davis Publications, testified that his firm received an advertisement from Chem Plastics and Paint Corporation, together with the Dunn & Bradstreet report on the company (Tr. 215, 216). Flamm testified that the Dunn & Bradstreet report that they received was different from the report that Porter Henry discussed (Tr. 219). The letter to Flamm's company was signed by Porter Gordon, one of the defendants who was acquitted. All of the purchasers testified that they did not receive help as stated by various salesmen.

A number of witnesses testified that they had exclusive areas granted by the company, however, discovered that other persons had similar exclusive areas granted by the company. There were some instances where a purchasers' area overlapped with that of another, however, was not the identical area.

The Government also produced the former Commissioner of the United States patents to show that the word "pylon" was not copyrighted or registered as represented by the companies (Tr. 1082).

James Cain testified that he received some mail from the company with the signature Ronald Borchelt (Tr. 267). Chester Zawacki testified that he met Ronald Borchelt (Tr. 398), in St. Louis. All of the conversations about his purchase were with Angelini (Tr. 399). Allen Briggs testified that he met Borchelt in the St. Louis office (Tr. 419). Richard Parker met Ronald Borchelt at the St. Louis office (Tr. 445), and Borchelt was present when Bob Murray, one of the defendants, discussed the contract with Parker (Tr. 446).

Allen Fleming testified that he received some material in the mail from the company and a letter signed by Ronald Borchelt (Tr. 481). He went to St. Louis and met with Borchelt and had a discussion about the contract (Tr. 487). Carl Lampela testified that he received a call from Ronald Borchelt and was invited to St. Louis (Tr. 540), he had a discussion about the product with Borchelt and Angelini (Tr. 541).

Morris L. Rodney testified he met Ronald Borchelt at the office in St. Louis (Tr. 631), and that he brought out all the features of the product (Tr. 632), and that they would send somebody out to set up the business (Tr, 632).

Robert Seamen testified that he met some people in Orlando, Florida to discuss the product. He later went to an office in Philadelphia. Borchelt and Espich met him in Philadelphia. They discussed the entire operation at Seamen's house in New York State (Tr. 665).

John Brossard stated that Borchelt would send Angelini to help him for at least one month (Tr. 724).

Borchelt testified that he was sales manager for Chem Plastics and was general manager of National Chem Plastics from July, 1965 to present (Tr. 1272). He first started selling pylon in May of 1962 (Tr. 1272). He left the company in March or April of 1963 (Tr. 1274). He started a distributorship in Columbus, Ohio. Appellant Espich started to work for him in July of 1964. Appellant Angelini answered one of his direct mail cards and became a pylon dealer in Ohio (Tr. 1278).

Harold Pritchard offered Borchelt a job as a sales manager for Chem Plastics and Paint Corporation in October or November of 1965 (Tr. 1279). Pritchard left St. Louis the first part of 1965 (Tr. 1281). At this point, Pritchard opened an office in Las Vegas, Nevada.

The St. Louis sales office was located at 1828 Locust Street, and they had a plant on Bartmer Avenue in St. Louis (Tr. 1282).

The company moved out to 1550 Page Industrial Court in May of 1965 (Tr. 1283). The company signed a twenty year lease for the building (Tr. 1283). The new plant was used to manufacture pylon and also for office space (Tr. 1285). The factory was equipped with various mixing vats (Tr. 1285), and rollers and other equipment to manfacture and pack the product (Tr. 1286). The various products of the company were manufactured at the plant on Page Industrial Court (Tr. 1287). Borchelt testified that Colonel Wood, one of their customers, was sold an exclusive franchise for an area in Colorado. The Colonel was to have a man help him when he took additional

leave time from the Air Force. The Colonel received only the product that he purchased. Some few days after Colonel Wood returned to Colorado Tr. 1295), he called Borchelt and said he was having difficulty in obtaining extra leave. He wanted a representative out to help immediately. Borchelt advised that this was not possible (Tr. 1296). Some short time thereafter, Colonel Wood called and stated that he did not have time to devote to selling the product (Tr. 1297). He had been furnished all the necessary sales material (Tr. 1297).

Borchelt testified that he met Albert Pearson, one of the Complainants, at their office in St. Louis. Pearson did not enter into a contract in St. Louis (Tr. 1299), however, mailed the agreement to St. Louis at a later date (Tr. 1301).

Borchelt testified in detail as to his transactions with James Cain (Tr. 1305), Robert Seaman (Tr. 1312), Raymond Hutson, (Tr. 1325), Steve Tomczak (Tr. 1329), A. W. Fleming (Tr. 1334), Morris Rodney (Tr. 1443) Richard Parker (Tr. 1346), John Brossard (Tr. 1350), Carl Lampela (Tr. 1357), and Adrian Freeman (Tr. 1360).

Borchelt testified that he had never seen the Dunn & Bradstreet report with the notation "Further investigation being conducted" (Tr. 1369). A large number of people testified as to the quality of the product and that they were well satisfied with the product and its results. Five of the dealers, distributors, and jobbers for National Chem Plastics testified concerning their business dealings with the company and the Defendants (Tr. 1579, 1601, 1624, 1635, and 1643).

Roger H. Klosterman, certified public accountant, testified that the books were incomplete (Tr. 1098), and that

it would be impossible to render any opinion on the status of the company. He could not tell what the assets or the liabilities of the company were (Tr. 1098). There were not enough ledger sheets to make any kind of opinion (Tr. 1098). The witness did not prepare any statement as to the inventory or purchases or net worth or surplus (Tr. 1103). The accountant further testified that he could not prepare a statement as of June 30, 1965, as the books were incomplete (Tr. 1104), the net worth could not be figured for the same reason (Tr. 1106). The net profit of the corporation could not be determined because the books were not posted through 1965 (Tr. 1107).

Petitioner Borchelt dealt with only nine customers out of the twenty-nine customers named in each Count of the indictment.

There was no evidence that Borchelt had anything to do with the sales office in Las Vegas, Nevada, nor was there any evidence that Borchelt had authorized any of the salesmen, either in the Las Vegas office or the St. Louis office to make any representations on his behalf concerning the obligations of the company.

There were a total of twenty-nine Counts in the indictment, one was dismissed by the Government at the beginning of the trial.

Daniel Angelini testified that he was employed as a salesman for Chem Plastics and Paint Corporation from December of 1960 and then with National Chem Plastics Corporation (Tr. 1501). Prior to December, 1964, he was a dealer of pylon in Mansfield, Ohio. He worked out of the Las Vegas office for approximately three months from October until December (Tr. 1053). He was an honorary Vice President (Tr. 1503). Angelini testified that he had

dealings with Chester Zawacki, and that he sold him one thousand dollars worth of the product ($1,000.00) (Tr. 1505). He testified that Mr. Zawacki intended to go into the business on a part time basis, and that the company could not give him any assistance if he was going to work just part time (Tr. 1506). Angelini testified that he went to Ozark, Alabama, and met with Laban Hendrix (Tr. 1507). Mr. Hendrix entered into a contract with the company that was drafted by his attorney (Tr. 1508). The contract provided that assistance would be rendered sixty days from date (Tr. 1509). When the time expired, Mr. Hendrix advised Angelini that he was not interested in the product (Tr. 1510). Angelini further testified that Carol Snell did not pick up his product or accept delivery because the freight charges came collect (per the contract) (Tr. 1514).

Angelini had some discussion with Carl Lampela concerning the contract (Tr. 1414). He stated that he was to help Mr. Lampela, however, Mr. Lampela advised the company that he had set up six dealers, and therefore, Angelini would not have to help him (Tr. 1515).

Angelini sold John Brossard thirteen thousand nine hundred dollars ($13,900.00) worth of the product (Tr. 1519). He spent two weeks in Florida with Mr. Brossard (Tr. 1519).

A number of persons testified as to the quality of the product and that they were all well satisfied with the product. Five of the dealers, distributors and jobbers testified concerning their business dealings with the product and with Danial Angelini.

Angelini dealt with only a small portion of the customers named in the twenty-nine count indictment. There was no

evidence that Angelini had anything to do with the transactions of any of the other salesmen.

Calvin Popejoy testified that he lives in Las Vegas, Nevada, and at the time of the trial was general manager of the Dodge agency in Henderson, Nevada (Tr. 1537). Prior to that, he was part owner of Biddulfh Rambler, Inc., Las Vegas, Nevada (Tr. 1538). He had no affiliations with Chem Plastics and Paint Corporation (Tr. 1538). He started out as President of National Chem Plastics on July 1st, 1965 (Tr. 1539). He purchased part of the company from Harold Pritchard (Tr. 1539). In July, 1965, he did not do very much for the company. He left the company in the end of December, 1965 (Tr. 1541). Popejoy did no sales work while he was with the company (Tr. 1544). The extent of Popejoy's activities consisted of signing some of the contracts (Tr. 1545). He met with a customer by the name of James Hoeft, however, had nothing to do with the sale, other than ask how much merchandise he wanted (Tr. 1546). Popejoy testified that he hired salesmen to help various dealers in the field (Tr. 1546).

## REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals is in conflict with its own prior decisions, broadens the exceptions to the Hearsay Rule to a point where the exceptions extinguish the rule and denies the petitioners of the right of confrontation of witnesses.

2. The decision of the Court of Appeals fails to adequately consider the sufficiency of the evidence upon which to sustain the convictions.

### I.

**Whether the admission of unsworn, out-of-court declarations by third persons not named as defendants violates the hearsay rule and denies petitioners the constitutional right of confrontation.**

The general principle in this point of Petitioners' argument has been decided adversely and incorrectly by the 8th Circuit Court of Appeals in Schaeffer v. United States, 265 F. (2d) 750, and Riestroffer v. United States, 258 F. (2d) 379. Petitioners feel that the position the Court has taken is erroneous and cannot be sustained by even the broadest rules of evidence. I think Judge Gardner's statement in Lane v. United States (8th Circuit), 34 F. (2d) 413, certainly lays the foundation for petitioners' attack on this type of evidence, wherein the Judge stated, "The admission of this testimony seems to be violative of one of the most elementary rules of evidence." The 8th Circuit Court of Appeals has taken the position that the evidence is admissible for the purpose of showing that the scheme is what the Government said it was, namely, a scheme to defraud people of money or property. If we follow this "rule of Law" to its conclusion, the Court would then admit any evidence, regardless of its nature and character,

as long as it tended to prove what the Government said the Appellants were guilty of.

I don't think the Court of Appeals intended such an illogical conclusion to be based upon that rule of Law. However, when the Court starts with a premise as invalid as this one is, the logical conclusion is the complete abolition of the rules of evidence.

Prior to the decision of the 8th Circuit Court of Appeals in the instant case, the Court had never held the statements of salesmen, not named as defendants or as co-conspirators, as an exception to the hearsay rule.

Counsel has searched the volumes written on exceptions to the "hearsay rule" and has been unable to find a single statement that would support the Court's position.

The necessity for creating exceptions to the hearsay rule is founded upon two basic considerations, 1) the unavailability of the declarant and 2) the probability that the person testifying will render a trustworthy statement of what the declarant said. In the instant case all of the persons testifying to out-of-court declarations of salesmen were victims of the alleged fraud. All of the persons had parted with their money based, in part, on the declarations of the salesmen.

The probability of the victim rendering trustworthy testimony of a third person who took his money is extremely doubtful. The natural tendency to remember or repeat only a portion of the statement that will aid the victim and the prosecution is the more natural probability.

The unavailability of the declarants was never shown. The Dept. of Justice had no trouble in bringing in wit-

nesses from Alaska to Florida to New York. The matter of bringing in additional witnesses who were formerly salesmen was a simple one. The department could have subpoenaed them, indicted them or charged the petitioners with a conspiracy and name the salesmen as co-conspirators in the case. None of the above was done.

The Court of Appeals has held, in a retrospect judgment, that there was adequate circumstantial evidence to show that the petitioners had authorized and ratified the statements. This holding is incongruous with the Court's holding that the statements constitute an exception to the hearsay rule (Appendix A, p. 47). Neither of the foregoing are supported by sound judicial judgment.

The Court of Appeals has, in the words of Justice Murphy, allowed the hearsay to lift itself by its own bootstraps to the level of competent evidence. Glasser v. United States, 315 U.S. 60.

The ever expanding prosecutions under the "mail fraud statutes" requires this Court to issue its mandate setting forth competent rules of evidence to govern the trials of "mail fraud prosecutions."

The rules of evidence, as they now stand, give the defendant greater safeguards if he is charged with the more serious crime of conspiring than if the defendant is only charged with the substantive offense. Mr. Justice Brennan stated in Wong Sun v. United States, 371 U.S. 471, "we have consistently refused to broaden that very narrow exception to the traditional hearsay rule which admits statements of a co-defendant made in furtherance of a conspiracy of joint undertaking"; Counsel assumes that His Honor is referring to a "scheme" by the reference to "joint undertaking."

The present state of the law is that if one is charged with a conspiracy only statements of co-defendants or co-conspirators made out of his presence under certain conditions are admissible; but if one is charged with a scheme and violation of the substantive offense, he is bombarded with hearsay declarations regardless of their source, i.e., co-defendant or conspirator, or third person, regardless of the conditions under which they were made.

None of the statements admitted into evidence were made by any of the other co-defendants. All of the statements were made by persons not named as a defendant, conspirator or co-conspirator.

It should be noted that Petitioners were not charged with a conspiracy to violate the Mail Fraud Statutes, however, were charged with entering into a scheme, and then set out the substance as charged in individual counts. The 8th Circuit Court of Appeals has said that the scheme is somewhat like a conspiracy, and therefore, the hearsay of the salesmen is admissible. Counsel suggests that we call a scheme a conspiracy and analyze the admissibility of such statement if it were in fact a conspiracy. Our Courts have held that hearsay statements of **co-conspirators** (our emphasis) are admissible against the other conspirators, even though made out of their presence if the declaration was made during the pendency, and in furtherance of the conspiracy, Krulewitch v. United States, 336 U. S. 440. The statements of the salesmen not named as a Defendant nor named as a co-conspirator would not be admissible in the trial of the conspiracy case, and the statement of salesmen not named as Defendants or named as co-conspirators in a non-conspiracy case could ever been admitted without violating the hearsay rule, thus the Court held the statements to be exceptions to the rule.

The 8th Circuit Court of Appeals had for many years held such evidence to be inadmissible. None of the cases so holding have ever been overruled, and Counsel feels a thorough analysis of these cases should be made in view of the question now presented to the Court.

In Lane v. United States, 34 F. (2d) 413, at Page 415, the Court, speaking through Judge Gardner, stated:

> "The admission of this testimony seems to be violative of the most elementary rules of evidence. The testimony elicited was palpably hearsay, unless it was admissible on the theory that it constituted a declaration of a co-conspirator. It was not made in the presence of the Defendants on trial; it constitutes no part of the res gestae."

The testimony objected to in the case at Bar certainly was not that of a co-conspirator, was not made in the presence of the Defendants on trial and certainly does not constitute a part of the res gestae.

In Beck v. United States, 33 F. (2d) 107, the Trial Court had admitted into evidence a number of statements made by salesmen, not in the presence of the Defendants, and not shown to have been authorized by the Defendants. The Court held, at Page 112:

> "It must be true that no man can be held liable for a false pretense or promise if he neither made the pretense or authorized it. It is doubtful as to whether the corporation could be held civilly for unauthorized or unratified promises of the salesmen; it is more doubtful whether the President could be personally held; these questions need not be discussed for the doctrine of respondeat superior that sometimes holds the principle for representations he neither authorized nor ratifies, express or implied, is a doctrine of civil liability and not of criminal responsibility. The

> Court proceeded on the theory that any representation made by those employed by the company was competent, irrespective of ratification, and this was error."

The Court's observation that the doctrine of respondeat superior is a doctrine of civil liability and not a criminal liability, is certainly correct. I think, however, that this was the doctrine that has led the Court of Appeals to the erroneous decision in admitting this type of testimony. The District Court in the instant case certainly proceeded on the theory that **any representation or statement** (our emphasis) made by those employed were competent evidence against the Appellants irrespective of Appellants' knowledge, acquiescence, ratification or contents of the statements. A close review of the hearsay admitted will certainly reveal this, and this will be discussed at a later point.

In Barrett v. United States, 33 F. (2d) 115, the Court was faced with the identical evidence that Appellant objects to in the case at Bar. The Court held:

> "Unless Barrett can in some legal way be connected up with these statements, it seems clear that he can not be held criminally responsible for every statement or promise made by a salesman that drew upon his imagination instead of his authority to close a contract. Evidence of what salesmen said to the prospective clients should have been excluded, unless such statements were either authorized or ratified. It still must be the law that a man may not be criminally held for representations he neither made, authorized or ratified. This representation must be traced to the Defendant through the doctrine of agency, although a conspiracy or joint plan to do a certain thing in a certain way may meet the requirements."

In reviewing the nature of this evidence, the Court must bear in mind, a salesman can certainly not be held to be the agent of another salesman.

There is certainly no evidence in the case at Bar that the Petitioners either authorized, acquiesced or ratified the statements of any of the other salesmen. In Gold v. United States, 36 F. (2d) 16, the Court held that the admission of statements outside the presence of the Defendant was error unless the authority was shown for the purpose of making said statement. In U. S. v. Boyd, 12 L.Ed. 36, acts and declarations of agents were admitted without previous evidence of the appointment of the agent. The Court stated at Page 48 that "Before a party can be made responsible for the acts and declarations of another, there must be legal evidence of his authority to act in the matter."

I think the Law set out in Beck v. United States, 305 F. (2d) 595, is certainly appropriate in the case at Bar. In that case, there was a setting up of a planned sales program, and the training of and instruction to the salesmen by the Defendants. The Court said, at Page 601, "With this foundation, the statements and representations made by the salesmen became admissible." At Page 600, the Court said "it is agreed the general rule admits the admission of such statements, if they have been expressly or impliedly authorized, or have been ratified by the person against whom they are offered. A proper foundation must always be laid." The record in the case at Bar is completely devoid of any evidence whereby Petitioners had expressly or impliedly authorized or ratified any of the statements by the salesmen as testified.

The hearsay testimony of all of the other salesmen may have established a scheme on their part, however, there

is much doubt as to whether or not Petitioners knew or participated in said scheme, if there was such a scheme.

The rule laid down by the Court of Appeals in Riestroffer has certainly been abused by the Trial Courts. I don't think it was the intention of the Court to allow any hearsay testimony by agents or salesmen (the better rule based on sound reason is to exclude), but to only allow that testimony that tended to prove method of operation or a common plan or scheme. Assuming arguendo, that the Court's position is correct, a close review of all of the hearsay admitted in the case at Bar will reveal that none, or very little of the testimony tended to prove a common plan or scheme or method of operation. Let's examine the objected portions of testimony in detail.

Raymond Garrison was allowed, over objection, to testify that a Mr. Richards, who said he was with National Chem Plastics, promised him that he would get reimbursed for his travel expenses (Tr. 207). Garrison further testified that Mr. Richards stated in response to a question about a round-trip ticket, "Don't worry about that, we will put you up for a couple nights. We want you to see the place" (Tr. 207). Garrison further testified that Richards said, "And we want you to meet our executives, and the expenses will be paid entirely" (Tr. 207). None of the aforementioned conversation tended to prove a common plan or scheme or, as the Court says, that the scheme was what the Government said it was.

Witness James Cain testified, over objection, in response to a question by the Government, what did Mr. Farris say, and the answer was, "Mr. Farris said that he was very tired, because he got in late the night before, and they got up at five-thirty to fly to Chicago, and he didn't want

to talk business that afternoon. Then we went down to lunch, and all the time, he hadn't unpacked his bag. After lunch, or during lunch, he got a telephone call" (Tr. 277). Witness Cain was further allowed to testify to the following: "He said they just made a big deal with the Mexican Government on paint. Then after lunch, we went back up to the room, and we sat around. He said he was so tired, but he didn't lay down. He just sat there, and we talked about everything but the business. We did talk a little bit about it, but everything he said didn't seem to make too much sense to me anyway" (Tr. 278). Witness Cain further testified to conversation by salesman Farris as follows: "He said that his daughter was seriously injured in an automobile accident in St. Louis, and this call was from there, made at the house" (Tr. 278).

Witness Chester Zawacki testified to conversations with salesman George Hurst. Witness Zawacki stated that Hurst said "That they felt I was the party chosen by this here Chem Plastics to represent them in this particular area of mine, and that what you call it, on their expense, they would pay if I came down and visit them at their plant" (Tr. 396).

Assuming the Court is going to admit third party salesmen representations as competent evidence against the Petitioners, there definitely should be some distinction between any statement made by salesmen, as set out in Chester Zawacki's testimony, as opposed to statements made that in fact do prove a common plan or scheme.

Witness A. W. Fleming testified that George Hurst with Chem Plastics in St. Louis had called him and "He wanted to know if I had any interest in becoming a distributor for the company" (Tr. 483). Witness Walker Burkett tes-

tified that Nelson McNary, a Chem Plastics salesman in Las Vegas, Nevada, told him over the telephone, "He said they had several dealers, but not distributors in Portland" (Tr. 569). Burkett further testified that McNary said, "I was quite anxious to send a man up by plane the next morning to come to my home and contact my wife and myself" (Tr. 569). Witness Burkett further testified to conversations with a Mr. Robert Popejoy, "He said that he would send, the company would send a man up to set up a training program to get us started, show us how, and have a training program for our salesmen, and that I would hire salesmen, and they would be trained by this man" (Tr. 570).

Witness Burkett further testified to a conversation with a man by the name of Sawyer in Portland, Oregon. Burkett "asked him what his position was with the company, and he said he was a representative of Chem Plastics Company, and I asked him if he was to see me get started, and he said "that wasn't his business." He was "to hire salesmen and sell Chem Plastics in the Portland area" (Tr. 575).

Burkett further testified that Sawyer said, "He told me to go on and start my own business, that that wasn't in line with his duties. He wasn't there to set up other distributors" (Tr. 577).

Witness Raymond Hutson, who did no business whatever with Petitioners, testified to conversations with George Hurst. He said that Hurst told him he was sales manager. The witness stated, "He told me that I could have an exclusive contract in the State of Florida to distribute Chem Plastics products for seven thousand dollars ($7,000.00) (Tr. 703). Witness Hutson further tes-

tified, "Mr. Hurst said that they were interested in me, and I felt this wasn't entirely illogical, because I do have an established distribution business, and he said that they would concede a point and give me a part of Florida with certain conditions, if I put up four thousand dollars ($4,000.00)" (Tr. 705). He further testified to conversations with a Gerald Rolf concerning the manufacturing of the product. He stated, "He said they did not manufacture" (Tr. 708). He further testified, "Mr. Rolf said that he didn't know where the factory was. He didn't know where the laboratory was. He said that if I entered into an agreement with them, that there would be field assistance or would be someone come down and help me set up the business, establish the business" (Tr. 709). Witness Robert Goggin testified that a man by the name of McNary with Chem Plastics in Las Vegas called him and "He said I should come to Las Vegas, to drive up that week, and as soon as possible" (Tr. 787). He further testified that McNary said, "That in order to secure a County distributorship, one would have to invest, he said, seven thousand dollars ($7,000.00)" (Tr. 788). Goggin testified further that McNary then went on to explain to me that one is expected to invest seven thousand dollars ($7,000.00) in order to secure a Countywide distributorship, and I talked a little with him about the product. He, of course, demonstrated by use of a board with samples on it, a little bit about the product, and then I informed him that I was not prepared to invest seven thousand dollars ($7,000.00) cash, but that I did want a County distributorship" (Tr. 789). Goggin further testified that McNary said, "He agreed then that I could have the distributorship and all of Riverside County, and also that I could have the City of San Bernadino, if, once again, I moved enough of the merchandise in a limited time (Tr. 790).

The Court allowed Witness Bruce Haskell to testify that a salesman by the name of Yates said, "He asked me if I found it interesting, and I said, yes, I did, and he said if I would fly to Las Vegas, he would explain to me more thoroughly" (Tr. 816).

Witness Otis Warner testified that salesman Jim Dondich "asked for me to come over to Las Vegas, said that his company would pay the expenses if I would come over there to familiarize myself with the product they had to offer, including exclusive franchise" (Tr. 844). Witness Warner further testified that Dondich told him "He said that if I would invest as a part of the company, that he would send two representatives over to San Diego for perhaps six weeks or longer, if necessary, to set up dealers who would be working under me as their distributor" (Tr. 845).

Witness Carol Snell testified that salesman Larry Russell called him. Snell stated that "The discussion was that this matter couldn't be settled by phone; that it was too complicated and too much involved, and that if I would come to Las Vegas, that he would go into further consultation in the matter" (Tr. 881).

Witness Ralph Storey testified that a salesman by the name of Kahn called him on the telephone. Storey testified "He told me he represented the National Chem Plastics, and that he had received a letter from me, and that they would be glad to pay my expenses to Las Vegas about the deal, and so he said to get an airplane and come, and I told him that we would rather drive" (Tr. 904). Witness Storey further testified that Mr. Beck told him "That he would be out soon after the order was delivered and help me set up the business" (Tr. 905).

Witness Lee Brunson testified that salesman Howard Couch called him to discuss the franchise. Brunson stated that Couch "Explained a little bit about the product" (Tr. 929), and "The merits of the product" (Tr. 930).

The Court permitted Witness Vernon Moore to testify as to conversations with Bill Townsend, a salesman in the Las Vegas, Nevada, office. Bill Townsend said, "He asked me and my wife to fly to Las Vegas. He said this territory was open but no one in the territory at the time, he said" (Tr. 954). The Court then allowed Witness Moore to testify to conversations with salesman Robert Popejoy, "He said he'd help me start and, well, we talked about seven thousand dollars ($7,000.00), and discussed the Counties, and he said he'd help me start when I got the merchandise personally" (Tr. 956). After the contract had been consummated, Witness Moore then was allowed to testify to further conversations with salesman Robert Popejoy, "He said I had an exclusive, anything that was sold in my territory, I'd get credit for it" (Tr. 960).

Witness Larry Poole testified to conversations with salesman James Dondich, "He said that it was an exclusive franchise; and that I had my choice of several areas, and I told him my preference" (Tr. 982). Witness Poole further stated that Dondich told him the following, "He said, told me that several other gentlemen at that time were interested in it, and that if I wanted it, I would have to act quickly" (Tr. 982). He further testified, "And he said not to worry, because the corporation would help me set up the business in every aspect, and assured me of this" (Tr. 982).

Witness Albert Pearson testified that salesman Hurst "Told me to give him my phone number, and he'd call

me back" (Tr. 1011). Witness Pearson further testified to the following conversations with Hurst, "He asked me my interest in the investment, as far as my capital was concerned, and I said, well, the answer's minimum three hundred. Well, let's start from there. So he said, could you make it fifteen hundred if we could make it interesting for you. He said why don't you come out and we will get acquainted. He further said, 'Yes, we will pick up the tab.' He said anytime at your convenience" (Tr. 1012). Witness Pearson further testified to conversations with Robert Popejoy over the telephone, "Well, he said I'll have to wire St. Louis and find out why you haven't got your money yet and see that you do get it" (Tr. 1026). And "He was telling me a few things of what they had done down there, and that there was a restaurant across the street, and he suggested that I go over and look at it, in the floor, which I did" (Tr. 1026).

Witness James Hoeft testified to a conversation with Del Christensen. Hoeft stated that Christensen said "That they helped set up the business. If you become the distributor, they will come up and give you assistance in setting up the business and taking you out and showing you how to sell it" (Tr. 1052).

The admission of the foregoing testimony denies the Petitioners the right of any cross-examination of the declarant. The Petitioners are faced with testimony of witnesses testifying to statements of third parties, and have absolutely no way to determine whether or not the witness is drawing upon his imagination or embellishing or changing or modifying whatever the actual statement may have been.

The matter could be simply resolved by the Government naming all of the various salesmen as co-conspirators in a

conspiracy indictment or by naming them as Defendants in the Mail Fraud Indictment.

There is no evidence whatever in the record that Petitioners even knew these third party salesmen, and less evidence that they ever authorized, either expressly or impliedly, or ratified any of the statements made by the salesmen.

A close examination of this "Rule of Law" previously upheld by the Court of Appeals in Schaefer and Riestroffer bears out the fundamental unfairness to the Petitioners in the admission of such testimony. Counsel feels the Court's prior decision in excluding such testimony is proper.

II.

**Whether the lack of positive evidence of essential elements of the offenses charged against petitioners, their interest and the commission of acts, except such as may possibly be created by inferences based upon inferences, vitiates petitioners' convictions.**

Petitioner Borchelt was convicted on Counts 1, 2, 5, 6, 7, 8, 9, 11, 12, 13, 15, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, and 29. A detailed review of the evidence against Borchelt as to each particular Count is now in order.

Count 1 charges the mailing on or about March 31st, 1965. The letter was signed by Porter E. Gordon, a Co-defendant, who was acquitted, and addressed to Mr. Walter S. Burkett. Walter Burkett dealt with a man by the name of Nelson McNary, Robert Popejoy and Appellant Angelini. The only dealing that Mr. Burkett had with Borchelt was a letter from Mr. Borchelt suggesting that "You get off your rump and make an effort to sell your products."

Count 2 was a form letter from Chem Plastics signed by Ronald Borchelt, and addressed to Mr. A. W. Fleming. There was no evidence whatever that Borchelt either mailed the letter or caused the letter to be mailed.

Count 5 alleges a mailing of a form letter from Chem Plastics and Paint Corporation, signed R. D. Borchelt. There was no date on the postmark of said letter (Tr. 510) nor was there any evidence produced that Borchelt either mailed the letter or caused the letter to be mailed.

Count 7 alleges a mailing from Chem Plastics and Paint Corporation and a letter signed by Ronald Borchelt addressed to Carl G. Lampela. Count 7 stands in the same position as the prior counts where there was no evidence produced to show either directly or indirectly that Borchelt either mailed or caused the letter to be mailed.

Count 8 alleges a mailing to a Mr. and Mrs. Parker in Denver, Colorado, and signed by Porter E. Gordon, a co-defendant, who was acquitted. There was no evidence whatever that Borchelt either directed, authorized or in any way actually mailed or caused the letter to be mailed and signed by Porter Gordon.

Count No. 6 charges a mailing from Chem Plastics and Paint Corporation of a letter signed by Ronald D. Borchelt to a Mr. R. H. Hutson. The evidence shows that all of the negotiations, conversations that Mr. Hutson had were with a George Hurst (Tr. 704), the only statement that Borchelt made to Mr. Hutson was, "Well, so you want to become a distributor of Chem Plastics Products" (Tr. 710). At no time did Mr. Hutson ever enter into a contract with Chem Plastics and Paint Corporation or any of the individual Defendants.

Counts 9, 11, 12, 13, and 17 allege mailings by Chem Plastics and Paint Corporation and National Chem Plastics Corporation by Ronald Borchelt, however, in each of those particular instances and Counts, there is no evidence that Borchelt either mailed the particular letters or that he caused those letters to be mailed.

Counts 24, 26, 27, and 28 all relate to persons that Borchelt had absolutely no dealings whatever with, and that all of the dealings were by third party salesmen, not named Defendants in this indictment.

Further, as to the aforesaid Counts, there was no evidence whatever that Borchelt either mailed directly or indirectly or caused the letters to be mailed.

Counts 15, 18, 19, 20, 21, 22, 23, 25, and 29 allege the mailing of a letter from Chem Plastics and Paint Corporation or National Chem Plastics Corporation, the majority of which were not signed by any person, and the balance signed by persons other than Borchelt.

Again, there is no evidence that Borchelt either mailed, directly or indirectly or caused the mailing of any of the aforesaid letters in these Counts.

Petitioner Angelini was convicted of Counts 1, 2, 5, 6, 7, 8, 9, 11, 12, 13, 15, 17, 18, 19, 20, 22, 23, 24, 25, 26, 27, 28, and 29. Except for a short period of time when Angelini was in the Las Vegas office as honorary Vice President, Angelini at all times mentioned in the evidence was a salesman and either called on prospective purchasers in person or talked to them by way of the telephone. Angelini did not sign any of the letters set out in the counts that he was convicted on, nor was there any evidence that Angelini had any authority or control over any of the mail-

ings. There is no evidence whatever that Angelini either mailed any of the letters or caused the letters to be mailed. The fact that he was working for the company or companies that sent letters through the mail certainly cannot be reason enough to hold that he legally caused the letters to be mailed. The fact that the customers that he dealt with received letters from the company can in no way bind Angelini unless there is some evidence to show that he authorized the mailing of said letters. The Court must in mind that this is not a conspiracy indictment, and that Angelini is not criminally responsible for any acts of the others. If there had been a conspiracy indictment and Angelini had been charged as a Defendant and conspirator, then in that event, the act of one Defendant would naturally be the act of all, however, that is not the case nor the facts in the case before this Court.

Petitioner Calvin Popejoy was convicted on Counts 6, 12, 15, 17, 20, 22, 23, 25, and 29. A review of all of the Exhibits, both Plaintiffs and Defendants, will show that Popejoy's name appears on many, many documents, however, the evidence also showed that his name was signed there by various persons, and in very few instances did he actually sign any documents. His sole position with the firm, as set out in his statement of the case, was that of President for a short period of time. The evidence is wholly insufficient to hold him criminally responsible for any acts of any other persons. He did not participate in any sales to any purchasers, and the largest extent of his participation in any matter was that he discussed the amount of product with Witness James Hoeft (Tr. 1054). The record is wholly devoid of any evidence, either direct, indirect or circumstantial, wherein it can be found that Popejoy either mailed or caused any letters to be mailed as charged in the indictment.

In United States v. Schaeffer, 299 F. (2d) 625, 7th Circuit, the Court stated,

> "Clearly, it is only when the mails are used in employing the scheme, that the scheme becomes a Federal crime. The use of the mails need not be central to the scheme but may be entirely incidental, United States v. Cashen, 281 F. (2d) 669, and the mail need not contain fraudulent representations, Criswell Keith v. Wilingham, 264 F. (2d) 76."

> "Nevertheless, we hold that in order to sustain a conviction, the Government must show impact of the scheme on the investor, and that the mails were used in those instances where the impact occurred. To state our holding differently, even though a scheme to defraud in the sale of securities may have been operative on certain investors, if the sale of these same securities would be legal absent the employment of the scheme, and if the sales to those investors in which the use of the mails are charged are not tainted by the employment of the scheme, no offense has been proved. The Statute is clear in this regards; the mail must be used and **employed** the scheme however incidental the mailing may be."

In Whealton v. United States, 13 F. (2d) 710, the Court comments on the evidence needed to sustain a conviction as to the mailing. The Court states, "It is plainly evidenced in the Statute that the mailing in furtherance of the fraud is the crux of the crime declared therein." Necessarily, therefore, the mailing in furtherance of the fraud must be proved before conviction can be had or sustained. The proof need not be direct. It may be circumstantial. Freeman v. United States, 20 F. (2d) 748, and cases there cited at Page 30. But, the circumstances proven must be such as will directly support an inference of the fact to be established, so as to exclude all reasonable doubt to the extent of overcoming the presumption

of innocence, United States v. Baker, 50 F. (2d) 122. Nor can an inference essential to the establishment of the crime be rested upon another inference. Brady v. United States, 22 F. (2d) 399, and United States v. Ross, 92 U. S. 281, 283, at Page 713. There was further testimony in the Whealton case that one of the victims of the alleged fraud testified that he received the letter. There was no proof independently as to whether or not the Appellant in that case had in fact mailed the letter. The Court stated at Page 13, "Levy's testimony as to his receipt of the letter is as far as the evidence goes with respect to Whealtons alleged mailing of the letter." That was non-sufficient. Freeman v. United States, supra. In the Freeman case, in addition to the proof of the addressee's receipt of the statement in the mails, it was also proven that the one charged with having mailed it had signed the statement. But, in the present case, it was not proven that Whealton signed his name, which appears on the letter received by Levy. The Government contends that Whealton's signature to the letter was admitted * * *. However, even had the signature been admitted, proof of Levy's receipt of the letter, and Whealton's signature would not sustain a finding that Whealton had mailed the letter or had caused it to be mailed. Freeman v. United States, supra. There must be proof, either direct or circumstantial, of mailing by someone."

In United States v. Cohan, 145 F. (2d) 82, the Court stated at Page 90, "It is true, of course, that a letter mailed after the scheme was completed will not serve. Mitchell v. United States, 126 F. (2d) 550." The review of the various letters in the case at Bar will reveal a number of instances where the Count letters were mailed after the alleged scheme was completed.

In Estep v. United States, 140 F. (2d) 40, at Page 45, the Court, in reviewing the sufficiency of the evidence against a co-defendant, in mail fraud violation, stated, "There is no evidence reasonably tending to show that Estep originally devised the scheme to defraud, or form the conspiracy." The Court went on further to state, "But, without the knowledge, the intent cannot exist. Furthermore, to establish the intent, the evidence of knowledge must be clear, not equivocal." Direct Sales Company, Inc. v. United States, 319 U. S. 703, 63 S. Ct. 1265. "Often the line between honest belief and purposeful misrepresentation is fine and indistinct, between the two, however, lies guilt or innocence, and where the evidence is evenly balanced between guilt and innocence, a conviction cannot stand." In reversing the conviction, the Court stated, "We conclude that the verdict of the jury as to Estep is not supported by that degree of proof which we deem essential to a finding of guilty knowledge of criminal intent, that accordingly the judgment is reversed as to him.", at Page 45.

In United States v. Cohan, 145 F. (2d) 82, at Page 90, the Court notes a distinction between a conspiracy and a scheme, "That a conspiracy differs from a scheme in that, being an agreement, the parties must have agreed upon all elements of the crime—including the use of the mails," United States v. Crinmens, 123 F. (2d) 271.

In Kann v. United States, 328 U. S. 88, at Page 95, in commenting upon the sufficiency of evidence in the mail fraud case, the Court stated, "The Federal Mail Fraud Statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate State law."

In view of the serious extension of the exceptions to the hearsay rule created by the Eighth Circuit Court of Appeals, the lack of uniformity concerning such issue, the ever increasing prosecutions under the mail fraud statute wherein a scheme is charged and the absence of a decision on the point by the Supreme Court of the United States, Counsel respectfully urges that certiorari be granted and the questions presented be resolved.

## CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for certiorari should be granted.

Respectfully submitted,

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## APPENDIX A

[December 19, 1967.]

Before VAN OOSTERHOUT, MATTHES and MEHAFFY, Circuit Judges.

VAN OOSTERHOUT, Circuit Judge.

Defendants Pritchard, Popejoy, Murray, Angelini, Espich and Borchelt, hereinafter jointly referred to as defendants, have each appealed from their convictions by a jury and the resulting sentence on various counts of an indictment charging them with mail fraud in violation of 18 U.S.C.A. § 1341. Defendants named above, along with Leon Hauser and Porter E. Gordon, were jointly tried on a twenty-nine count mail fraud indictment. Counts 14 and 16 were dismissed by the court as to all defendants. Hauser and Gordon were acquitted upon all counts. Pritchard was convicted on each of the twenty-seven counts submitted. Defendants Murray, Angelini and Espich were each found guilty on Counts 1, 2, 5, 6, 7, 8, 9, 11, 12, 13, 15, 17, 18, 19, 20, 22, 23, 24, 25, 26, 27, 28 and 29, and acquitted on the remaining counts. Defendant Borchelt was convicted on all of the counts last set out and in addition was found guilty on Count 21, and was acquitted on Counts 3, 4 and 10.

Pritchard was sentenced to five years imprisonment on Count 1 and certain other counts, such sentences to be served concurrently, and in addition was sentenced to five years under the provisions of 18 U.S.C.A. § 4208(a) (2) on Count 2 and certain other counts consecutively to the Count 1 sentence, and was fined $1,000 on each of Counts 1, 26, 27, 28 and 29.

Murray was given concurrent sentences of thirty months upon all the counts upon which he was convicted, to be

served pursuant to 18 U.S.C.A. § 4208(a) (2), and was fined $1,000 upon Count 1.

Angelini was sentenced to three years imprisonment on Count 1 and certain other counts to be served concurrently, and to three years under Count 2 and certain other counts, pursuant to 18 U.S.C.A. § 4208(a) (2), to run consecutively to the sentence on Count 1.

Espich was given concurrent sentences of three years under 18 U.S.C.A. § 4208(a) (2) upon each count upon which he was convicted and sentenced to a fine of $500 on Count 1.

Borchelt was sentenced to four years imprisonment on Count 1 and certain other counts, to be served concurrently, and to four years under § 4208(a) (2) on Count 2, and certain other counts, to be served consecutively to the sentence imposed on Count 1. He was fined $1,000 on each of Counts 1 and 28 and $500 on Count 29.

Popejoy was given concurrent sentences upon all the counts upon which he was convicted of thirty months under 18 U.S.C.A. § 4208(a) (2) and fined $1,000 on Count 6. Costs were taxed to defendants jointly.

Chem-Plastics & Paint Corp. was incorporated in Missouri in 1962 with principal place of business in St. Louis. In 1965 such corporation was succeeded by National Chem-Plastics Corp., a Nevada corporation with principal place of business at Las Vegas. Operations were also continued in St. Louis. Both corporations were engaged in the sale of paint products, particularly Pylon products, a type of plastic coating. The indictment covers 1964 and 1965 transactions.

Defendant Pritchard was the principal owner and operator of both corporations. Pritchard made attempts to

conceal his ownership of the Nevada corporation and sometimes used and signed the name "Hauser". Popejoy was president of the Nevada corporation from July to December 1965. Borchelt became manager at St. Louis in the fall of 1964 and has been general manager since July 1965. Defendants Angelini, Murray and Espich were primarily salesmen. Angelini bore the title of Vice President and there is evidence that Espich had the title Secretary.

The indictment charges and the evidence establishes that the defendants convicted entered into a scheme to defraud prospective purchasers of franchises to sell their product. Advertisements were placed in numerous newspapers and magazines with national circulation inviting inquiries with respect to profitable franchises. People answering the advertisements were usually sent descriptive literature and were invited to visit the plant in St. Louis or Las Vegas, where upon arrival they were usually put in touch with one or more of the defendants. The scheme consisted of false representations as to the financial strength of the company, false promises as to aid in establishing and training a sales organization, false promises of an exclusive territorial franchise, false statements as to copyright protection, and false statements as to profit possibilities. The victims, on the basis of representations made, were sold large quantities of paint in order to obtain their exclusive franchises. In nearly all instances the paint was delivered. There is some dispute about the quality of the paint but the Government has not based its case on misrepresentations of paint quality. False representations as to direct mailing and advertising aid are also charged.

The promises of sales assistance, although sought by the franchise purchasers, were not carried out. The promises

of exclusiveness of the franchise were in many instances violated. There is substantial evidence that the financial statements used to impress the victims of the corporation's financial stability were knowingly false. Many of the direct advertising reply cards received from prospective customers were not sent to the franchise holders in accordance with the promises made and in some instances were used by the defendants for making direct sales.

The defendants were tried together below and their appeals are consolidated here. All defendants are now represented by the same counsel. Angelini and Borchelt have filed separate briefs. The remaining defendants have filed a joint brief. The briefs filed differ with respect to facts relating to the participation or lack thereof on the part of the various defendants but all briefs raise the same errors for reversal, to wit:

I. Refusal to sustain motions of all defendants for judgment of acquittal on all grounds made at the close of all the evidence for the reason that the evidence was insufficient to sustain a conviction on any count.

II. Error in admitting testimony of statements made by salesmen, who were not defendants, to victims for the reason that such testimony is prejudicial hearsay and that there is no showing defendants authorized or ratified any acts or statements of such salesmen.

III. Prejudicial error in refusing to give defendants' requested instructions 1, 2, 3, and 4.

IV. Refusal to strike testimony of Charles Guess concerning financial status of corporation for the reason the books were not kept by Guess nor were they kept in the ordinary course of business.

V. Errors in admitting in evidence exhibits 102 and 109—two cancelled checks.

We have examined the asserted errors in the light of the record and find no prejudicial error has been committed and hence an affirmance is required. We shall discuss the asserted errors in the order in which they are set out above.

I.

All motions for acquittal were properly overruled. Under the familiar, well-established principles of appellate review, the evidence must be viewed in the light most favorable to the Government as the prevailing party before the jury, and the Government is entitled to the benefit of all reasonable inferences that may properly be drawn from the evidence. **Friedman v. United States**, 8 Cir., 347 F.2d 697, 706; **Koolish v. United States**, 8 Cir., 340 F.2d 513, 519.

As heretofore pointed out, each sentence of imprisonment is imposed on conviction upon many counts. With respect to all defendants except Popejoy, the imprisonment sentences are imposed on Count 1, with sentences imposed on certain other counts to run concurrently with the Count 1 sentences. Consecutive sentences of imprisonment are imposed only on defendants Pritchard, Angelini and Borchelt, such sentences being imposed on Count 2 convictions and concurrently imposed on other designated counts. Popejoy's imprisonment sentence is imposed on Count 6, with concurrent sentences on all other counts upon which he was convicted. Fines were imposed on the various defendants on specific counts as hereinabove stated.

In order to support the convictions, it is not necessary to determine the sufficiency of the evidence to support the conviction on all counts. The burden is on the defendants

to establish that the evidence is insufficient to support conviction upon any count upon which the sentence is concurrently imposed. In **Isaacs v. United States**, 8 Cir., 301 F.2d 706, 733, we state the law here pertinent as follows:

> "Firmly embedded in federal jurisprudence is the principle that a general sentence on several counts of an indictment will be sustained on appeal if the defendant was properly convicted under any count which is good and which is sufficient in itself to support the judgment and sentence. **Barenblatt v. United States**, 360 U.S. 109, 115, 79 S.Ct. 1081, 3 L.Ed.2d 1115; **Lawn v. United States**, 355 U.S. 339, 359, 78 S.Ct. 311, 2 L.Ed. 321; **Bunn v. United States**, 8 Cir., 260 F.2d 313, 316; **Guon v. United States**, 8 Cir., 285 F.2d 140, 142."

The law with respect to mail fraud cases is well-established by our prior decisions. See **Fabian v. United States**, 8 Cir., 358 F.2d 187; **Gold v. United States**, 8 Cir., 350 F.2d 953; **Koolish v. United States**, 8 Cir., 340 F.2d 513; **Isaacs v. United States**, 8 Cir., 301 F.2d 706.

The essential elements of the mail fraud offense are (1) a scheme devised by or knowingly and intentionally participated in by defendants which is designed to defraud victims by false pretenses or representations knowingly or intentionally made by defendants or authorized or ratified by them, and (2) the use of the mails in furtherance of such scheme.

A fact issue on the use of the mails is clearly established. Many advertisements were inserted in newspapers and magazines having national circulation for the purpose of establishing contacts with prospective victims. Most of the leads which resulted in the transactions here in controversy came from responses of victims to such advertisements. Thus adequate basis exists for the inference

that the use of the mails in circulating such advertising was a part of the scheme. See **Atkinson v. United States,** 8 Cir., 344 F.2d. 97.

There is also evidence of direct mail correspondence by the various defendants and the victims. The letters referred to in many of the counts were written before the scheme was consummated. The mail correspondence with respect to some of the counts occurred after the victim had entered into a franchise and had paid his money, and upon such basis defendants claim that the use of the mails is not a part of the execution of the fraud. We do not deem it worthwhile to review the extensive volume of correspondence affecting the various counts. Many of the letters written after the consummation of the transaction would appear to be lulling letters of the type described in **Bliss v. United States,** 8 Cir., 354 F.2d 456, 457. In any event, the foreseeable use of the mail in delivering the extensive newspaper and magazine advertisements, which occurred prior to the consummation of the transactions, affords sufficient proof of use of the mails.

There is substantial evidence that each of the convicted defendants worked for a common purpose for a considerable period of time; that each spent considerable time at the principal offices of the company at Las Vegas and St. Louis; that each assisted in closing deals, in some of which various defendants participated jointly; that representations made to victims were in all cases quite similar; that each defendant had full knowledge of the nature of the business; and an adequate basis exists for an inference that each defendant knowingly and intentionally participated in the fraudulent scheme.

In **Isaacs v. United States,** 8 Cir., 301 F.2d 706, 726, we reaffirmed our prior holding to the effect that:

"Where two or more persons jointly devise and execute a scheme to defraud by the use of the mails, they may thereby become in effect partners in the criminal purpose of so using the mails to defraud. If they do, the acts of each thereafter, during the existence and execution of the scheme, done in furtherance of that execution, may become the acts of all the partners, and each may be convicted of the mailing of a letter which one of his partners caused to be mailed in the execution of the scheme. **Baker v. United States,** 8 Cir., 115 F.2d 533, 540, cert. den. 312 U.S. 692, 61 S.Ct. 711, 85 L.Ed. 1128."

We shall briefly summarize the victims evidence in support of Counts 1 and 2 upon which all prison sentences except that of Popejoy are primarily based. Burkett, the Count 1 victim, residing in Portland, Oregon, first learned of defendants through an advertisement in the "Firm Foundation", an Austin, Texas, religious publication, which advertisement reads:

"EXCLUSIVE FRANCHISE Amazing new liquid plastic coating used on all types of surfaces interior or exterior. Eliminates waxing when applied on Asphalt Tile, Vinyl, Linoleum, Vinyl Asbestos, Hard Wood, and Furniture. Completely eliminates painting when applied to Wood, Metal, or Concrete surfaces. This finish is also recommended for boats and automobiles.

"NO COMPETITION As these are exclusive formulas in demand by all businesses, industry and homes. No franchise fee. Minimum investment—$300. Maximum investment—$7,000. Investment is secured by inventory. Factory trained personnel will help set up your business.

"For complete details and descriptive literature write: CHEM-PLASTICS & PAINT CORP., 1828 Locust, St. Louis 3, Missouri."

Burkett responded to the advertisement by letter and received a packet of brochures from defendants and a

letter directing him to contact the Las Vegas office if interested after reading the material. He phoned such office and on the following day defendant Angelini visited him in Portland. Angelini represented as part of the deal that the company would send a representative to set up a training program and get the business off to a good start, and that Burkett would have an exclusive franchise for eight counties including Portland. He signed the tendered contract and paid $3,000. Thereafter he saw an advertisement in the Portland paper by National Chem-Plastics for a salesman and upon investigation, found a Mr. Sawyer was selling Pylon in Portland. He complained by letter and Borchelt responded that Sawyer was operating a regional factory office and was there to help Burkett. None of Burkett's requests for the promised assistance, made either to Sawyer or the defendants, brought about any of the promised assistance. Sawyer stated that he was not there to help other distributors.

Fleming, the Count 2 victim, replied to defendants' business opportunity advertisement in the Denver Post. He responded by writing to the address given and received defendants' sales literature. Shortly thereafter, Angelini contacted him by telephone and invited him to St. Louis, and thereafter sent a telegram advising that the company would pay the expenses of the trip. He went to St. Louis with his wife and was given the sales pitch by Borchelt, including representations as to the profit potential, that Colorado was virgin territory, that the franchise was to be exclusive and that extensive aid would be given in recruiting and training a sales organization. No contract was then signed. Later Espich followed up with a visit to Denver and renewed the assurances, stating that he would immediately advertise for, interview and train salesmen and stay in Denver for a time to help set up the busi-

ness. The contract was signed, $7,000 was paid by certified check and Espich immediately disappeared. Subsequent pleas for the promised assistance brought no results. Fleming later learned that others had franchises to sell the product in the area. Efforts to sell the product met with very little success.

Hutson, of Gulf Breeze, Florida, the Count 6 victim, upon which count defendant Popejoy's imprisonment sentence was first imposed along with the fine, saw defendants' opportunity advertisement in a Birmingham, Alabama, newspaper. He replied and ultimately accepted an invitation to visit the St. Louis office of defendants. An exclusive Florida distribution franchise was discussed with Borchelt and several salesmen. The representations made were similar to those made in connection with Counts 1 and 2. Hutson testified that he was unconditionally promised travel expenses to St. Louis and that the same were never paid. A contract signed by Borchelt was submitted but never signed and no franchise transaction with Hutson was consummated. Success of the fraudulent scheme is not an essential element of the mail fraud offense and the lack of success of the fraudulent scheme constitutes no defense. **Atkinson v. United States, supra; Adjmi v. United States**, 5 Cir., 346 F.2d 654, 657.

We have also examined the evidence in support of the convictions on Counts 26, 27, 28 and 29, upon which some of the fines are based, and find that the evidence in support of such counts is sufficient to support the conviction.

Inasmuch as the convictions upon the counts discussed support the prison sentences and fines imposed, we deem it unnecessary to give detailed consideration to any of the remaining counts. It appears to us that a substantial evi-

dentiary basis exists to support the conviction upon all counts.

II.

The trial court admitted in evidence, over defendants' objection, the testimony of the victims named in sixteen counts with respect to representations made to them by salesmen purporting to represent National Chem-Plastics. Such salesmen were not named as defendants. It is not charged in the indictment that they are participants in the alleged fraudulent scheme. **Defendants vigorously** urge that the statements made to the victims by such salesmen, out of the presence of the defendants, constitute inadmissible hearsay testimony. It seems quite clear that such testimony is hearsay and hence the real issue is whether such testimony falls within an exception to the hearsay rule.

We believe that there is adequate evidence to establish that National Chem-Plastics was used by the convicted defendants as a device through which they carried out a fraudulent scheme and that the salesmen making the representations were employed by such corporation for the purpose, among others, of selling franchises to sell Pylon. In **Beck v. United States,** 8 Cir. 33 F.2d 107, 112, we held:

> "It must be true that no man can be held liable for a false pretense or promise if he neither made the pretense nor authorized it. It is doubtful as to whether the corporation could be held civilly for unauthorized and unratified promises of a salesman; it is more doubtful whether the president could be personally held; those questions need not be discussed, for the doctrine of respondeat superior that sometimes holds a principal for representations he neither authorized nor ratified, expressly or impliedly, is a doctrine of civil liability, and not of criminal responsibility. Ma-

terial representations made by Barrett in the presence of Beck, or by others authorized by Beck to make them, are competent; evidence that such representations were used in securing money from contract holders is competent. But the trial proceeded on the theory stated by the court that any representation made by those employed by the company was competent, irrespective of Beck's knowledge, authority, or ratification; and this was error."

To like effect, see **Barrett v. United States**, 8 Cir., 33 F.2d 115; **Gold v. United States**, 8 Cir., 36 F.2d 16.

In **Beck v. United States**, 10 Cir., 305 F.2d 595, the court considers in depth the problem here confronting us and cites and quotes from many cases, including Eighth Circuit cases, and then holds:

"It is agreed the general rule permits the admission of such statements, if they have been expressly or impliedly authorized, or have been ratified by the person against whom they are offered. **Beck v. United States**, supra, **Barrett v. United States**, supra; **Gold v. United States**, supra. We are cognizant of the difficulties encountered by the government in a fraud case, but safeguards for the defendant from the dangers of hearsay evidence cannot be disregarded. See **Krulewitch v. United States**, 336 U.S. 440, 69 S.Ct. 716, 93 L.Ed. 790. The authority to render such statements admissible may be found in the circumstances of the particular case, in the scope of the plan or scheme or from other pertinent facts. A proper foundation must always be laid." 305 F.2d 595, 600.

In **Reistroffer v. United States**, 8 Cir., 258 F.2d 379, 387, we said:

"Where the scheme to defraud included making sales by means of certain false representations conveyed through salesmen, proof of the same misrepresentations being made at widely different places to different

persons by numerous agents in the same period, tends to prove that the scheme existed and that the particular salesman was carrying it on. As in the case of a conspiracy in operation the acts and declarations of each participant are admissible against all."

In **Fabian v. United States**, 8 Cir., 358 F.2d 187, 191, we again discussed the problem relating to the admissibility of salesmen's statements not made in the presence of the defendants and quoted and followed the rule adopted by the Tenth Circuit in **Beck**, supra, and affirmed the conviction. On the order of proof issue, we held:

"If that later proof shows, as it did here, that the defendants against whom the evidence is offered, did formulate and participate in a scheme to defraud, and the salesmen's statements were in furtherance of that scheme, then a proper foundation has been laid. The problem here it not unlike that which arises in conspiracy cases in which the declarations of an alleged conspirator are offered against an alleged co-conspirator, who was not present when the statements were uttered. In that type of case we have held it to be discretionary with the trial judge whether to admit the evidence subject to later proof of the existence of a conspiracy." 358 F.2d 187, 192.

We recognize that caution must be exercised by the trial court in the reception in evidence of statements of salesmen not made in the presence of the defendants and that proof of employment of the salesmen standing along is an insufficient factor for admitting representations made by the salesmen to the victim. There must be some evidence to suport a finding of authorization or ratification by the defendants of the statements made by the salesmen and whether there be such authorization or ratification will usually present a fact issue to be decided on a case-to-case basis.

Here, as in **Beck, Reistroffer** and **Fabian,** we find adequate circumstantial evidence to support a finding that the statements made by the salesmen were authorized or ratified by the defendants participating in the fraudulent scheme. The representations made by the salesmen were substantially similar to those made by the defendants in similar situations and followed the same pattern. The salesmen were frequently present when defendants made **their sales pitches.** Many of the representations were made by the salesmen in the St. Louis or Las Vegas office. On other occasions if an inquiry had been made by a prospect, the salesman was sent by the defendants to see the prospect and attempt to make the sale of a franchise. In a number of instances, the victims, after talking with a salesman, conferred with one or more of the defendants prior to entering into a contract and in such conversations, the representations made by the salesman were confirmed.

In any event, the negotiations with respect to many of the victims were handled directly by one or more of the defendants and the sentences imposed can be supported by convictions on counts in which there was no material participation of any nondefendant salesman. No prejudicial error was committed in the circumstances of this case in admitting the victims' testimony as to the salesmen's representations.

III.

Defendants excepted to the court's failure to give their requested instructions numbered 1, 2, 3, and 4. Numbers 1, 2 and 4 deal with the necessity of the Government proving criminal intent and state that defendants can not be punished for errors in judgment, mismanagement, or innocent mistakes, or for permissible puffing. The court re-

fused numbers 1 and 2 for the reason that their contents were in substance incorporated in the instructions given, and refused number 4 for the same reason and the additional reason that it was improper in form and assumed facts not established by the evidence. Number 3 advised the jury that a not guilty verdict would not affect the right of any injured party to make a civil recovery. Such instruction was not relevent on any issue to be considered by the jury and was clearly improper.

Defendants did not except to the instructions given by the court on intent or point to any desired expansion of such instruction or assign any reason why the instruction given was not adequate or was defective. Thus, it seems that the requirement of Rule 30, Fed. R. Crim. P., to the effect that objections must be specific, has not been complied with and that the asserted error is not preserved for review. **Dranow v. United States,** 8 Cir., 307 F.2d 545, 569; **Johnson v. United States,** 8 Cir., 291 F.2d 150, 156.

We have examined the instructions given by the Court and find that such instructions fairly cover the substance of the requested instructions on intent.

IV.

Guess, who served the corporation as part time bookkeeper and accountant, testified that he prepared the general ledger from subsidiary ledgers of the company and that he prepared the June 30, 1965, balance sheet and profit and loss statements from the company books. The company books were in court but were not offered in evidence. Guess testified that after he had prepared such statements from the books, he substituted falsified figures in the balance sheet at the insistence of Pritchard, which

made the company's financial position appear more favorable than it actually was. After Guess' cross-examination, defendants moved to strike Guess' testimony on the ground that Guess did not personally prepare all the books and records. The pertinent testimony relating to the use of false figures in the balance sheet went in without objection and the belated objection made by defendants did not reach such testimony. Additionally, **we are satisfied that a proper foundation had been laid for the admissibility in evidence of the corporate books.** See **United States v. Re**, 2 Cir., 336 F.2d. 306, 313; **Burger v. United States**, 8 Cir., 262 F.2d 946, 954.

## V.

Defendants claim of prejudicial error in the reception of exhibits 102 and 109 lacks merit. Exhibit 102 is a check relating to the Count 10 Seaman transaction. All defendants except Pritchard were acquitted on this count. The exhibit is a check given to and cashed by National Chem-Plastics for paint furnished by Seaman to Holiday Inns. Pritchard as a witness testified the check was retained because Seaman owed the company money. It would appear the check in controversy has little bearing upon the issues in this case. We are convinced that no prejudicial error resulted from its admission in evidence.

Exhibit 109 relates to the introduction of a $2,000 check given National Chem-Plastics on behalf of Hougen by his agent Tomczak in part payment of the franchise involved in Count 21. The hearsay objection to the check was made after testimony had been received that the check was given to cover the initial $2,000 payment. Such check appears to have been properly identified by the witnesses. In any event, any error in its reception can not be considered

prejudicial. Moreover, the conviction on Count 21 is not essential to sustain any of the sentences imposed.

We find that defendants have had a fair trial and that the defendant have failed to establish any prejudicial error has been committed.

The judgments are affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

## APPENDIX B

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory powers for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

## APPENDIX C

Judgment

UNITED STATES COURT OF APPEALS

For The Eighth Circuit

No. 18,502. September Term, 1967

Calvin Popejoy, Appellant,

vs.

United States of America.

Appeal from the United States District Court for the Eastern District of Missouri.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, Calvin Popejoy, do surrender himself to the custody of the United States Marshal for the Eastern District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after date of filing of the mandate of this Court in the District Court.

December 19, 1967.

Order entered on Opinion:—

ROBERT C. TUCKER,
Clerk, U. S. Court of Appeals
for the Eighth Circuit.

Judgment

UNITED STATES COURT OF APPEALS

For The Eighth Circuit

No. 18,504. September Term, 1967

Daniel Angelini, Appellant,

vs.

United States of America.

Appeal from the United States District Court for the Eastern District of Missouri.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, Daniel Angelini, do surrender himself to the custody of the United States Marshal for the Eastern District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after date of filing of the mandate of this Court in the District Court.

December 19, 1967.

Order entered on Opinion:—

ROBERT C. TUCKER,
Clerk, U. S. Court of Appeals
for the Eighth Circuit.

Judgment

UNITED STATES COURT OF APPEALS

For The Eighth Circuit

No. 18,506. September Term, 1967

Ronald Borchelt, Appellant,

vs.

United States of America.

Appeal from the United States District Court for the Eastern District of Missouri.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, Ronald Borchelt, do surrender himself to the custody of the United States Marshal for the Eastern District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after date of filing of the mandate of this Court in the District Court.

December 19, 1967.

Order entered on Opinion:—

ROBERT C. TUCKER,
Clerk, U. S. Court of Appeals
for the Eighth Circuit.

## APPENDIX D

UNITED STATES COURT OF APPEALS
For The Eighth Circuit
St. Louis, Mo. 63101

January 8, 1968

Mr. Theodore F. Schwartz
553 Pierre Laclede Building
7701 Forsyth Boulevard
Clayton, Missouri, 63105

Re: No. 18502. Calvin Popejoy v. United States.
No. 18504. Daniel Angelini v. United States.
No. 18506. Ronald Borchelt v. United States of America.

Dear Sir:

On consideration of the motion of appellants for a stay of the mandate in each of the above cases pending a petition to the Supreme Court of the United States for a writ of certiorari, it has been ordered by this Court that the issuance of the mandates be stayed for a period of thirty days from and after this date. If within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari and record have been filed, the stay which has been granted shall continue until the final disposition of the case by the Supreme Court.

Very truly yours,

ROBERT C. TUCKER,
Clerk.

cc: Hon. Veryl L. Riddle
United States Attorney
St. Louis, Missouri.

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SUPREME COURT, U. S.

FILED
MAR 15 1968
JOHN F. DAVIS, CLERK

No. 1125

# In the Supreme Court of the United States

OCTOBER TERM, 1967

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RONALD BORCHELT, CALVIN POPEJOY and DANIEL ANGELINI, PETITIONERS

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

ERWIN N. GRISWOLD,
*Solicitor General*

FRED M. VINSON, JR.,
*Assistant Attorney General,*

BEATRICE ROSENBERG,
SIDNEY M. GLAZER,
*Attorneys,*
*Department of Justice,*
*Washington, D. C. 20530.*

# In the Supreme Court of the United States

OCTOBER TERM, 1967

---

No. 1125

RONALD BORCHELT, CALVIN POPEJOY and DANIEL ANGELINI, PETITIONERS

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

### OPINION BELOW

The opinion of the court of appeals is reported at 386 F.2d 760.

### JURISDICTION

The judgment of the court of appeals was entered on December 19, 1967. Mr. Justice White extended the time for filing a petition for a writ of certiorari to February 17, 1968, and the petition was filed on

February 15, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether, in a trial for mail fraud, the testimony of the victims with respect to representations made by salesmen not named as defendants was admissible into evidence.

2. Whether the evidence was sufficient to support the convictions.

## STATEMENT

Petitioners and five others were indicted in the Eastern District of Missouri for using the mails for the purpose of executing a fraudulent scheme in violation of 18 U.S.C. 1341. Petitioner Borchelt was convicted on 24 counts, petitioner Angelini on 23 counts and petitioner Popejoy on nine counts. Borchelt was sentenced to imprisonment for a total of eight years—four years pursuant to 18 U.S.C. 4208(a)(2) on count 2 and certain other counts, to run consecutively to a term of four years imposed on count 1 and certain other counts. He was also fined $1000 on each of counts 1 and 28 and $500 on count 29 (Tr. 1834-1840). Angelini was sentenced to imprisonment for a total of six years—three years pursuant to 18 U.S.C. 4208(a)(2) on count 2 and certain other counts, to run consecutively to a term of three years imposed on count 1 and certain other counts (Tr. 1826-1833). Popejoy was sentenced to concurrent terms of imprisonment for 30 months and was fined $1000 on count 6 (Tr. 1850-1853). The court of appeals affirmed.

The evidence is summarized in the opinion of the court of appeals (Pet. App. A, 38-40, 42-46). In brief, it showed that in 1964 and in 1965 the Chem-Plastics Corporation and its successor, the National Chem-Plastics Corporation, were engaged in the sale of franchises for paint products. Most of their sales took place on company premises in St. Louis, Missouri, or Las Vegas, Nevada, which the prospective purchasers were invited to visit after responding to newspaper advertisements (*e.g.*, Tr. 483-485). These advertisements represented that factory-trained personnel would help set up a business for the franchise purchaser (*e.g.*, Tr. 215, 567). In selling franchises of jobber, dealer, or distributor based upon the amount of paint purchased, the company representatives also promised the assistance of company employees in establishing the business (*e.g.*, Tr. 486-490, 511-514, 569-570). The purchaser was also told that he would be the exclusive jobber, dealer, or distributor in the particular area covered by the contract (*e.g.*, Tr. 1061-1062). On occasion the franchise purchaser was promised that he could return the paint products and be reimbursed if he was dissatisfied (*e.g.*, Tr. 493-494).

Typically, after a franchise was sold, no company representative would aid the purchaser despite pleas for assistance and despite the fact that some customers had originally told the salesmen they had no experience with paint or in selling (*e.g.*, Tr. 488, 493-496, 847-848). Demands for cash reimbursement were fruitless (*e.g.*, Tr. 154-155). Overlapping franchises were sold (*e.g.*, Tr. 1063). The bro-

chure used by the representatives to promote the sales also contained false statements as to financial condition of the company (Tr. 46-59).

Petitioner Borchelt was first the manager at St. Louis and then the general manager of National Chem-Plastics Corporation (Tr. 486, 1271-1272). Petitioner Angelini was a salesman with the title of vice-president (Tr. 20-21, 90-91). Both Borchelt and Angelini participated in the sales of some franchises and each represented that the purchaser would be given sales assistance and that the franchise would be exclusive (*e.g.*, 486-488, 547). Petitioner Popejoy was the president of National Chem-Plastics Corporation between July and December 1965 and was in its Nevada office (Tr. 90, 1539-1540). In response to complaints from franchise purchasers, Popejoy promised that company employees would be sent out shortly to assist them (Tr. 847-848, 908-909, 987-988).

## ARGUMENT

1. Petitioners contend that the statements made to victims by company representatives not named as defendants constituted inadmissible hearsay testimony (Pet. 15-29). That contention was thoroughly considered and was properly rejected by the court below (see Pet. App. A, 47-50). What the court of appeals stated in *Reistroffer* v. *United States*, 258 F.2d 379, 387 (C.A. 8), certiorari denied, 358 U.S. 927, is likewise applicable to this case:

> Where the scheme to defraud included making sales by means of certain false representations conveyed through salesmen, proof of the same

> misrepresentations being made at widely different places to different persons by numerous agents in the same period, tends to prove that the scheme existed and that the particular salesman was carrying it on.

Here, not only were the representations made by the unindicted salesmen similar to the representations made by the persons named as defendants, but in many instances the statements were made on company premises, and were thus clearly an integral part of the fraudulent scheme. Nothing in the cases cited by petitioners is to the contrary.

2. Petitioners' claim that there was no evidence that they either mailed or caused the mailing of letters pertinent to particular counts is without merit (Pet. 29-36). Criminal responsibility is not dependent upon the actual mailing of letters nor upon proof of specific directions as to mailing. It is sufficient to show that it was foreseeable that the mails would be used in the ordinary course of business in each transaction. *Pereira* v. *United States*, 347 U.S. 1, 8-9. That was clearly the situation here. Indeed, the advertisements employed to draw the victims into the scheme called for the use of the mails. Petitioners in substance are simply asserting an insufficiency of evidence. That contention was considered and rejected by both lower courts (see Pet. App. A, 41-47), and does not warrant further review in this Court.[1]

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[1] As for the claim of petitioner Popejoy that his participation in the sales was limited (Pet. 32), his position as president for a five-month period and his knowledge from customer complaints that the company was falsely representing that it would furnish assistance to the franchise purchasers amply supported the jury's finding of guilt as to him.

## CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
*Solicitor General.*

FRED M. VINSON, JR.,
*Assistant Attorney General.*

BEATRICE ROSENBERG,
SIDNEY M. GLAZER,
*Attorneys.*

MARCH 1968.